Nos. 80-207, 80-213, 80-214

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CBS INC., AMERICAN BROADCASTING COMPANIES, INC. AND NATIONAL BROADCASTING COMPANY, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER AMERICAN BROADCASTING COMPANIES, INC.

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December 18, 1980

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

As interpreted by the Court of Appeals, Section 312 (a) (7) of the Communications Act empowers the Federal Communications Commission, first, to determine when a federal election campaign begins and, second, to impose upon broadcasters the obligations, reviewable by the agency, to entertain federal candidate requests for the purchase of political time from the beginning date of the campaign and to consider the campaign needs of individual candidates in the context of responding to such requests. The question presented is whether this interpretation is contrary to the purposes of the Communications Act, usurps the previously recognized discretion of broadcast licensees in the area of political programming, and interjects the FCC too deeply into the political process in violation of the First Amendment.

PARTIES BELOW

Petitioner American Broadcasting Companies, Inc. was a petitioner in the proceedings before the United States Court of Appeals for the District of Columbia Circuit, the court whose judgment is here under review. Other petitioners in the Court of Appeals were CBS Inc. and National Broadcasting Company, Inc. The Federal Communications Commission and the United States of America were the respondents below. Carter-Mondale Presidential Committee, Inc. and National Association of Broadcasters were intervenors below.*

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* American Broadcasting Companies, Inc. has no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates. We understand the terms "parent companies," "subsidiaries," and "affiliates" to mean those corporations whose shares are publicly traded. A "parent company" is understood to be a corporation which owns a majority of the shares of another corporation. A "subsidiary" or "affiliate" is understood to be a corporation a majority of whose shares are owned by another corporation.

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BRIEF FOR PETITIONER AMERICAN BROADCASTING COMPANIES, INC.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 629 F.2d 1 and appears as Appendix A to the separate volume of appendices filed jointly by American Broadcasting Companies, Inc., CBS Inc. and National Broadcasting Company, Inc. to accompany the petitions for writs of certiorari. The opinions of the Federal Communications Commission are reported at 74 F.C.C.2d 631 (1979) and 74 F.C.C.2d 657 (1979) and appear as Appendices B and C, respectively.*

JURISDICTION

The judgment of the Court of Appeals was entered on March 14, 1980. 629 F.2d 1, Pet. App. 2a. Timely

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* References to the Appendices volume submitted with the petitions for writs of certiorari are cited herein as "Pet. App. ——." References to the Joint Appendix filed simultaneously herewith are cited herein as "J.A. ——."

petitions for rehearing and suggestions for rehearing *en banc* were denied by the Court of Appeals on May 15, 1980. Pet. App. 152a-53a. On June 4, 1980, the time for filing a petition for writ of certiorari in No. 80-207 was extended to August 11, 1980 (Pet. App. 154a) and the petition in that case was filed on that date. The petitions for writs of certiorari in Nos. 80-213 and 80-214 were filed on August 13, 1980. The petitions in all three cases were granted and the cases were consolidated by this Court in orders entered on November 3, 1980. J.A. 267-69. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the Constitution of the United States, and Sections 312(a)(7) and 315(a) and (b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 312(a)(7), 315(a) and (b). While each of these constitutional and statutory provisions is set forth in an appendix (Pet. App. 155a-57a), the key statutory provision involved is Section 312(a)(7), which states as follows:

> "(a) The [Federal Communications] Commission may revoke any station license or construction permit—
>
> . . .
>
> "(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."

STATEMENT OF THE CASE

A. Statutory Background

Faced with mounting pressure to address certain problems generated by rapidly escalating campaign costs, Congress undertook a number of initiatives in the late 1960's looking toward possible changes in the various

laws affecting campaign financing and political broadcasting. Although legislation was passed in 1970 that was partially responsive to these concerns,[1] the measure was vetoed by President Nixon because the Administration favored different or more comprehensive changes.[2]

This spirit of reform, however, continued into the next Congress and culminated in the Federal Election Campaign Act of 1971[3]—a measure that was signed into law on February 7, 1972. The Act consisted of four titles—three of which generally dealt with limitations on political contributions and expenditures, the disclosure of campaign funds, and a number of administrative practices connected with the election process. Title I, known as the Campaign Communications Reform Act, was the broadcast reform section of the law. It contained three significant provisions: (1) a provision which established that, during the 45-day period preceding a primary election and the 60-day period preceding a general or special election, broadcast stations could not charge a legally qualified candidate a rate in excess of their "lowest unit charge . . . for the same class and amount of time for the same period;"[4] (2) a provision that imposed certain spending restrictions on candidates for federal elective office in their use of communications media (further restricting to 60 percent the amount of total media expenditures that federal candidates could devote to the

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[1] S.3637, 91st Cong., 2d Sess. (1970). S.3637 would have permanently suspended the "equal opportunities" requirement of Section 315(a) of the Communications Act for Presidential campaigns, established a ceiling on the amount of money candidates for federal or gubernatorial office could spend on radio and television, and required broadcast stations to charge candidates their lowest unit rate for comparable commercial time.

[2] S. Doc. No. 109, 91st Cong., 2d Sess. 1 (1970).

[3] Pub. L. No. 92-225, 86 Stat. 3 (1972) [hereinafter FECA of 1971].

[4] FECA of 1971, § 103(a)(1), 47 U.S.C. § 315(b).

broadcast media);[5] and (3) a provision that empowered the Federal Communications Commission to revoke a broadcast station license "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office."[6] The last of these provisions was codified as Section 312(a)(7) of the Communications Act and is the focal point of this litigation.

B. The Commission's Early Interpretation of Section 312(a)(7)

On March 16, 1972 the Commission issued a public notice containing new interpretive guidelines specifically directed to the provisions of Title I of the FECA of 1971.[7] With respect to Section 312(a)(7), the Commission's principal pronouncement took the following form:

> Q. How is a licensee to comply with the requirement of section 312(a)(7) that he give reasonable access to his station to, or permit the purchase of reasonable amounts of time by, candidates for Federal elective office?
>
> A. . . .
>
> Congress clearly did not intend, to take the extreme case, that during the closing days of a campaign stations should be required to accommodate requests for political time to the exclusion of all or most other types of programming or advertising. Important as an informed electorate is in our society, there are other elements in the public interest standard, and the public is entitled to other kinds of programming than political. It was not intended that all or most

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[5] FECA of 1971, § 104. This provision was repealed on October 15, 1974, by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 205(b), 88 Stat. 1278.

[6] FECA of 1971, § 103(a)(2)(A), 47 U.S.C. § 312(a)(7).

[7] *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 F.C.C.2d 510 (1972).

> time be preempted for political broadcasts. The foregoing appears to be the only definite statement that may be made about the new section, since no all-embracing standard can be set. The test of whether a licensee has met the requirement of the new section is one of reasonableness. The Commission will not substitute its judgment for that of the licensee, but, rather, it will determine in any case that may arise whether the licensee can be said to have acted reasonably and in good faith in fulfilling his obligations under this section.[8]

For the next six years the foregoing interpretive principles were applied on a case-by-case basis. Then, in 1978 the Commission undertook its first public proceeding concerning the administration of Section 312(a)(7). *Report and Order: Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d 1079 (1978) [hereinafter 1978 *Report and Order*]. The 1978 *Report and Order* remains the Commission's most comprehensive statement of its policies and practices under Section 312(a)(7).

While the 1978 *Report and Order* found that Section 312(a)(7) imposed "a different, additional obligation" applicable to federal candidates that went beyond a broadcaster's responsibility to provide time generally to political candidates under the public interest standard,[9] the Commission ultimately concluded that it would continue "to rely on the reasonable, good faith discretion of individual licensees" in evaluating Section 312(a)(7) complaints.[10] In particular, the Commission reaffirmed its longstanding position that "[i]t is best left to the discretion of a licensee when and on what date a can-

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[8] *Id.* at 536.

[9] 68 F.C.C.2d at 1088. In this regard, the Commission could "see no merit to the contention that Section 312(a)(7) was meant merely as a codification of the Commission's already existing policy concerning political broadcasts." *Id.*

[10] *Id.* at 1089 (footnote omitted).

didate's spot announcement or program should be aired." *Id.* at 1091. Although the Commission prohibited "arbitrary 'blanket' ban[s]" on the use of a "particular class or length of time in a particular period," the Commission believed that this policy would not "in any way disrupt a station's broadcast schedule," and that it would "result in little practical change in the political broadcast policies of most licensees who already afford Federal candidates their full complement of broadcast times." *Id.* at 1090-91.

C. The Carter-Mondale Committee's Request

By letters dated October 11, 1979, Gerald M. Rafshoon, President Carter's media adviser, acting on behalf of the Carter-Mondale Presidential Committee, Inc. (the "Committee"), sought to purchase from ABC and the other two major television networks one half-hour of time between 8:00 p.m. and 10:30 p.m., EST, on December 4, 5, 6 or 7, 1979. J.A. 35-40. The letters stated that the Committee intended to present "a documentary outlining the President's record and that of his administration" and that the program would "be run in conjunction with an announcement concerning [the President's] candidacy." J.A. 35, 37, 39.

In a letter dated October 23, 1979, ABC advised Mr. Rafshoon that it could not comply with the Committee's request for time on one of the early December dates, but that it expected to make time available early in 1980. J.A. 41.[11] CBS and NBC also declined to offer Mr. Rafshoon the requested time.

D. Proceedings Before The Commission

1. *The Committee Complaint*

On October 29, 1979, the Committee filed a complaint with the Commission alleging that the three networks

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[11] ABC subsequently advised the Committee and the Commission that it would make time available during the first week of January, 1980.

had denied the Committee reasonable access as required by Section 312(a)(7) and asking the Commission to "direct the networks to make time available for purchase" on the dates requested. J.A. 27, 33.

In response, ABC explained the factors which had led it to conclude that political time sales could reasonably commence in early January, 1980—instead of on the specific dates requested. Thus, the first of 36 Presidential primaries was, at that time, nearly four months away and the Democratic National Convention was more than eight months away. J.A. 54-55. ABC also noted that the potential for program schedule disruption would be considerable if the Committee were sold time in early December, as multiple candidates would likely assert equal opportunities rights under Section 315(a) of the Communications Act. J.A. 56. In this regard, ABC observed that at least nine Republicans had already declared their candidacy and that two Democratic leaders and a tenth prominent Republican were expected to announce within a short period of time. Finally, ABC emphasized that its continuing news coverage ensured that "the mixture of issues, developments (including candidate announcements) and personalities that dominate this early stage of the campaign are brought to the public's attention." J.A. 57.

2. *The Commission's Initial Memorandum Opinion and Order*

On November 20, 1979, a sharply divided (4-3) Commission held that all three networks had denied the Committee reasonable access under Section 312(a)(7), and directed the networks to formulate plans for immediate compliance. 74 F.C.C.2d 631, Pet. App. 69a.

In particular, the Commission faulted all three networks for an alleged failure to consider the specific needs of President Carter in evaluating the Committee's request for time. According to the Commission, the networks had not given sufficient consideration to the

fact that the proposed program was intended to "set the tone for the President's entire campaign and that this purpose [could not] be accomplished at a later date." *Id.* at 644, Pet. App. 91a. In this context, the Commission observed that its 1978 *Report and Order* had "placed particular emphasis on the candidate's needs." *Id.* at 642, Pet. App. 87a. After conducting an independent review of certain general campaign activities,[12] and reasoning therefrom that the 1980 Presidential campaign was then "in full swing," the Commission ultimately concluded that it was not too early to begin political time sales. *Id.* at 646-47, Pet. App. 94a.

In a Separate Statement, Commissioner Quello, whose vote was critical to the 4-3 decision, said that the "fundamental issues" raised by the case were "particularly difficult to resolve" "because they require the FCC to make some very subjective judgments in the emotionally-charged atmosphere of a political campaign." [13]

In dissent, Commissioner Washburn focused specifically on ABC's response to the Committee, concluding that "[a] one-month delay in this instance is not clearly unreasonable." *Id.* at 654, Pet. App. 107a. In Commissioner Washburn's view the "most troublesome" issue raised by the case was "the question of the FCC's in-

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[12] Among the activities or developments informally surveyed were the following: (1) candidacy announcements, (2) the establishment of national campaign organizations, (3) fund raising activities, (4) endorsements, (5) media coverage, and (6) the general progress of delegate selection. *Id.* at 645-46, Pet. App. 92a-93a.

[13] *Id.* at 654, Pet. App. 107a. During the Commission's November 20, 1979 open meeting in this case, this same Commissioner stated: "I hate to say the networks are unreasonable; I think maybe they had good reasons for opposing [the Committee's request]." J.A. 140. He could not, as a factual matter, find ABC's "one-month delay" to be "unreasonable." J.A. 145. Although it was a "very close call," he ultimately "disagree[d] with the conclusions of the networks." J.A. 140. During this same meeting, Commissioner Brown said that ABC's response made for a "very, very close case." J.A. 151.

terfering with the discretion of the broadcasters and substituting [the FCC's] judgment for theirs." "The proposition which [this] decision will stand for is that the candidate's own determination of his needs is overriding. The consequences of this precedent will rise to haunt the Commission and the public in future campaigns." *Id.*, Pet. App. 106a.

Commissioner Jones dissented on the grounds that "the facts of this case" did not provide "a clear showing that the networks have acted in an unreasonable manner." *Id.*, Pet. App. 107a. Also in dissent, Commissioner Lee termed the action "a serious abuse of the Commission's discretion," representing a major and unwise change in the law. *Id.* at 653, Pet. App. 105a.

3. *The Commission's Decision On Reconsideration*

The Commission's initial decision was released on November 21, 1979. On November 23, 1979, the next business day, all three networks petitioned for a stay and reconsideration of that decision.

In denying these petitions, the Commission rejected contentions that its initial *Memorandum Opinion and Order* had placed undue emphasis on the importance of candidate needs as a factor to be weighed in evaluating Section 312(a)(7) requests. The Commission did acknowledge, however, that its original decision "may not have fully explained the manner in which [the FCC] expect[s] licensees to weigh individual requests for reasonable access." 74 F.C.C.2d at 666, Pet. App. 125a. Thus, while stating that a broadcaster might properly consider such factors as program schedule disruption and candidate multiplicity, the Commission held that a broadcaster must "demonstrate the extent to which he has attempted to tailor his offer of airtime to be as reasonably responsive as possible (given countervailing factors) to a particular candidate's stated purpose in seeking the

airtime." [14] Furthermore, the Commission found that "the candidate's initial request of a campaign carries an air of reasonableness to it." [15] The decision also made clear that the Commission, not broadcasters, would decide on the basis of "objective" criteria when an election campaign was in full swing, thereby triggering reasonable access obligations. *Id.* at 666, Pet. App. 124a.

Commissioners Jones, Lee, and Washburn again dissented. Commissioner Lee summarized the Commission's action: "By the time the majority finishes its analysis of the networks' reasons for not giving time, the networks do not have any choice other than to give the requested time." *Id.* at 681, Pet. App. 149a-50a (footnote omitted).

E. The Decision Of The Court of Appeals

On appeal, a panel of the United States Court of Appeals for the District of Columbia Circuit, consisting of Judge Markey, sitting by designation from the United States Court of Customs and Patent Appeals, Circuit Judge Tamm, and Senior Circuit Judge Bazelon, affirmed the Commission decisions.[16] In an opinion written by

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[14] *Id.* at 668, Pet. App. 128a. In this regard, while the Commission denied any intent to "requir[e] broadcasters to make an assessment of individual candidate 'needs' insofar as they solely relate to the candidate's subjective, personal, or immediate 'political' desires," *id.* at 667, Pet. App. 127a, the Commission also concluded that broadcasters must "take into account" the fact that a candidate has requested "an opportunity to discuss a complex set of issues important to the electorate which he believes cannot be accomplished through spot announcements or short program requests." *Id.* at 668, Pet. App. 128a.

[15] *Id.* at 667, Pet. App. 127a. Commissioner Brown, concurring in the 4-3 decision, indicated in a Separate Statement that a candidate's first request could be denied only for "compelling" reasons. He could think of "few (if any)" such reasons. *Id.* at 679, Pet. App. 146a.

[16] The Commission's orders directing immediate compliance were stayed by the Court of Appeals pending review. The Committee subsequently withdrew its original request for a half-hour of time

Judge Bazelon, the court declared that Section 312(a)(7) created an affirmative right of access for individual candidates for federal elective office. In so ruling, the Court of Appeals characterized this Court's statement in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 113-14 n.12 (1973) [hereinafter *CBS* v. *DNC*] that Section 312(a)(7) had "essentially codified" prior Commission standards, as "*dictum* [that] strayed far from what was before the Court" and was, therefore, "not controlling here." 629 F.2d at 13, Pet. App. 20a-21a.

The Court of Appeals went on to affirm the Commission's "right to decide when in the campaign the access rights . . . attach." *Id.* at 17, Pet. App. 29a. Although acknowledging that "the Commission's pronouncements on this point have lacked the clarity that facilitates review," *id.* at 15, Pet. App. 25a, the court nonetheless reasoned that the orders could be reconciled with precedent.[17] The court also concluded that a determination of when access rights attach is "an objective, noneditorial judgment for which the Commission is better suited than either broadcasters or candidates," and one for which the Commission had established "reasonable" indicia to be used in its campaign-by-campaign approach. *Id.* at 17, Pet. App. 29a.

While observing that the test of reasonableness should be measured from the perspective of the broadcaster's *offer*, not the candidate's *request*, *id.* at 17-18, Pet. App. 30a, the Court of Appeals concluded that broadcasters must supply a "full explanation" of their decisions, ad-

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during the December 4-7, 1979 period because of developments related to the seizure of American Embassy personnel in Iran. The Committee purchased five minutes of time from CBS on December 4, 1979 and one half-hour from ABC on January 6, 1980. *See* 629 F.2d at 9; Pet. App. 11a.

[17] In this regard, the court remarked that the 1978 *Report and Order* "seems to have assumed that the 'question of when' was addressed to the FCC." *Id.* at 16, Pet. App. 26a.

verting, whenever relevant, to the five factors identified by the court.[18] The first factor, "the individual needs of the candidate (as expressed by the candidate)," is deserving of "special weight," according to the court's interpretation of Commission precedent. *Id.* at 19, Pet. App. 33a. With respect to the other four factors, the court explained that: (1) the amount of time previously provided a candidate only becomes relevant after the first request is granted, *id.* at 20, Pet. App. 36a-37a; (2) the potential disruption of the broadcaster's regular programming has to be "substantial" and takes on real significance only in the closing days of a campaign, *id.* at 21, Pet. App. 37a; (3) candidate multiplicity "*might* justify denying *or, more likely, limiting* a request for time," *id.*, Pet. App. 38a (emphasis added); and (4) the lack of reasonable notice could allow a broadcaster to deny a request in only rare instances (i.e., only a few days' notice given). *Id.*, Pet. App. 38a.

The opinion also held that the Commission's implementation of Section 312(a)(7) was a "constitutionally acceptable accommodation" of the rights of the public, candidates, and broadcasters.[19]

Finally, the court agreed with all of the parties in the case that the appeal was not moot simply because the Committee had purchased time from CBS in December and ABC in January.[20] Rather, the court regarded the

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[18] *Id.* at 21, 23, Pet. App. 38a, 41a. In its decisions, the Commission had consistently referred to *three* relevant "factors" to be applied in evaluating candidate requests—candidate needs, candidate multiplicity, and the availability of classes of time. *See, e.g.*, 74 F.C.C.2d at 642, Pet. App. 87a. After reviewing the *five* factors it considered critical, the Court of Appeals acknowledged that "the agency failed to headline its policy as clearly as it might have." Elaborating on this point, the court further stated that "[i]f an agency intends to demand that regulated companies consider and address all relevant factors, it must be clear and consistent in articulating those factors." 629 F.2d at 23, Pet. App. 42a.

[19] *Id.* at 25, Pet. App. 47a.

[20] See note 16 *supra*.

case as fitting squarely within the *Southern Pacific Terminal* v. *ICC*, 219 U.S. 498 (1911) line of cases holding that short-term administrative orders "capable of repetition, yet evading review" should be reviewed and not dismissed as moot. *Id.* at 27-28, Pet. App. 52a-54a.

In a concurring opinion, Judge Tamm voiced concern that the Commission had "come perilously close to falling into the chasm of impermissible government action." *Id.* at 34, Pet. App. 68a. He emphasized that "the danger of nonneutral government decisionmaking raises grave first amendment concerns," *id.* at 29, Pet. App. 56a, which are "exacerbated by the Commission's emphasis . . . on the 'individual needs' of the candidate." *Id.* at 32, Pet. App. 62a. Judge Tamm was particularly concerned about the risk of partiality in this case because "the principle of neutrality is at its zenith in the context of political speech." *Id.* at 31 n.8, Pet. App. 60a-61a n.8.

SUMMARY OF ARGUMENT

The indisputable focal point of this case is Section 312(a)(7) of the Communications Act, a provision that was enacted in the early 1970's as part of a comprehensive legislative effort to reassess federal laws affecting campaign financing and political broadcasting. It provides that the Commission may revoke a broadcast station license "for willful or repeated failure to allow reasonable access" to candidates for federal elective office. It was adopted against the background of an overall statutory scheme and longstanding Commission policy that made clear that although broadcasters were required to make their facilities available for use by political candidates, they were afforded substantial discretion in meeting this responsibility.

The interpretation placed on Section 312(a)(7) by the Court of Appeals substantially disturbs this carefully balanced approach, refined over a period of more than fifty years by the Congress, the Commission and this Court. It empowers the Commission to "legally" deter-

mine when a federal election campaign begins for the purpose of deciding when a broadcaster must first entertain requests for the sale of political time—no matter how long before the relevant election. And it requires broadcasters to assess the individual "needs" of federal candidates in the context of responding to their requests for political time—and then permits the Commission to reassess those needs in a detailed case-by-case review.

As we demonstrate, this dramatically different approach to political broadcasting, whereby the broadcaster's editorial discretion is virtually eviscerated in favor of recurring Commission oversight, creates a regulatory scheme that goes well beyond the legislative purpose of Section 312(a)(7) and conflicts with other important policies of the Communications Act and the First Amendment.

I.

By its literal and conspicuous terms, Section 312(a)(7) confirms a *general* right of broadcast access for legally qualified candidates for federal elective office. It manifestly fails to provide the terms and conditions of such access, incorporating, instead, only a concept of reasonableness—i.e., providing a remedy only where a station "willfully or repeatedly" fails to allow "reasonable amounts" of broadcast time. Accordingly, the addition of Section 312(a)(7) to the Communications Act was intended, as this Court has indicated, to essentially "codif[y] the Commission's prior interpretation of § 315(a) as requiring broadcasters to make time available to political candidates." *CBS* v. *DNC*, 412 U.S. at 113-14 n.12 (citations omitted).

The interpretation by the Court of Appeals not only comprehends obligations and conditions that far transcend the plain statutory language, it produces practical results that frustrate rather than enhance the principal legislative goals surrounding enactment of Section 312(a)(7). Thus, although Congress sought in the Federal

Election Campaign Act of 1971 both to shorten political campaigns and to reduce their rapidly escalating cost, the interpretation below greatly extends the potential length and the corresponding cost of media campaigning.

Of equal importance, the lower court's characterization of the statutory language and its misreading or avoidance of the relevant legislative history have the effect of virtually destroying the longstanding and deeply ingrained tradition of affording broadcasters substantial editorial discretion in selecting when and under what conditions to initiate political time sales. Thus, even though the Commission, with Congressional approval, has long held that broadcasters are under an obligation to make their facilities available for use by political candidates, heretofore this Commission policy has permitted broadcasters substantial discretion in deciding when political programming should be initiated, and encouraged broadcasters to treat all candidates in a given election on an evenhanded rather than individual basis.

This tradition in the political broadcast area is fully consistent—indeed mandated—by other policies or provisions of the Communications Act. For instance, one of the most important features of the Communications Act is its rejection of a common carrier approach for broadcasting, favoring instead a system permitting broad journalistic freedom and discretion for broadcast licensees, subject to ultimate public accountability. Moreover, Section 326 of the Communications Act—which expressly prohibits Commission censorship of broadcast material—similarly "evince[s] a legislative desire to preserve values of private journalism under a regulatory scheme which would insure fulfillment of certain public obligations." *CBS* v. *DNC*, 412 U.S. at 109. This basic statutory approach was also carried out in the principal political broadcasting provision of the statute (Section 315) which, *inter alia*, requires broadcasters to grant "equal opportunities" to opposing candidates when a broadcaster

makes an *initial* determination to grant or sell broadcast time to a political candidate.

These policies—which have been adhered to for more than fifty years of broadcast regulation—were effectively ignored in the lower court's opinion. The decisions in this case substantially depart from prior law in the political broadcasting area in general and earlier Commission interpretations of Section 312(a)(7) in particular. Under that pre-existing law, broadcasters were afforded substantial discretion in responding to political time requests and the governing standard was a "test of reasonableness." That standard—even though incorporated in the precise language of Section 312(a)(7)—has now been effectively read out of the statute.

II.

The new Commission standards endorsed by the Court of Appeals for implementing Section 312(a)(7) will also intrude upon broadcaster First Amendment rights and thrust the government too deeply into the partisan political process. By interpreting Section 312(a)(7) to require the initiation of specific programming within a narrowly defined time period under the threat of severe Commission sanction, the Court of Appeals decision threatens to upset the delicately balanced system of broadcast regulation specifically engineered by Congress and previously upheld by the courts to accommodate the First Amendment rights of broadcasters with other recognized needs of the statutory scheme.

Of equal significance, broadcaster discretion has been effectively preempted by a new and substantial involvement by the Commission in the partisan political process. Permitting the government to exercise active oversight in how broadcast facilities are to be used and for what specific political purposes is not only at odds with the principle of licensee discretion embedded in the Communications Act, but also places the government in an unacceptable political role.

The constitutional principle that demands neutrality in government decisionmaking, of particular importance in the context of political speech, is gravely threatened by the new standards laid down in this case—standards that stress the individual needs of candidates and make the determination as to when federal election campaigns begin for purposes of broadcast time sales a "legal" judgment of the Commission. Unlike the regulatory approaches exemplified by the fairness doctrine and the personal attack/political editorial rules upheld by this court in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), the newly sanctioned standards under Section 312(a)(7) permit agency review and implementing orders even though the broadcaster has made no initial choice in the presentation of particular program material.

In sum, by effectively usurping any meaningful licensee discretion and failing to recognize the dangers of interjecting the Commision too deeply into the political process when candidates seeking federal office request broadcast time, the decision in this case violates important constitutual principles.

ARGUMENT

Introduction

This case involves novel and highly sensitive issues bearing upon the government's carefully circumscribed role in the partisan political process, and the statutory and constitutional protections afforded the editorial judgments of broadcast licensees. It centers on Section 312(a)(7) of the Communications Act of 1934, as amended, which provides that the Commission may revoke a station license "for willful or repeated failure to allow reasonable access" to candidates for federal office. The construction placed on that statutory provision by the court below gives the provision a meaning that was unintended by Congress, that unduly restricts the discretionary judgment broadcasters have heretofore been permitted to exercise in allocating time to federal candidates, and that

impermissibly casts the Commission in the central role of supervising political programming—i.e., deciding which candidates should be heard, to what extent and when. The fundamental question presented is whether the Commission should be permitted to intrude so deeply into this process—sitting as the ultimate arbiter of when the sale of political time must begin and requiring broadcasters, subject to agency review, to assess the campaign "needs" of individual candidates.

The statutory and constitutional questions presented are critically important to all broadcast stations and affect all federal elections. If permitted to stand, the guidelines announced by the Commission and refined by the Court of Appeals will permanently and perniciously reshape the entire political broadcasting landscape. Instead of a system whereby political access to the broadcast medium is governed by the statutory touchstone of overall reasonableness, increasing reliance on a standard requiring an evaluation of individual candidate needs will inevitably produce a system that specializes in arbitrariness (laced with partisan political overtones).

While the decisions below plainly foreshadow a drastic transformation in the respective roles of broadcasters, candidates and the Commission, it must be emphasized that this case does not involve questions relating to the adequacy of radio and television coverage of political campaigns. In fact, the complaining candidate in this case was the incumbent President, whose regular access to the broadcast media is unparalleled.

Similarly, this case does not involve the denial of a candidate's request to purchase time to present his views in a manner of his own choice. As early as November 5, 1979, ABC indicated its willingness to sell time to the Committee in January, 1980, and the half-hour program requested by the Carter-Mondale Committee was, in fact, broadcast by ABC on January 6, 1980—more than six months before the first Presidential nominating conven-

tion and nearly ten months before the November 4, 1980 general election.[21]

Rather, this case involves the precise conditions of such access and the standards imposed by the Commission, and upheld by the Court of Appeals, to insure that such conditions are satisfied. The pivotal issue is not whether President Carter's campaign received adequate coverage throughout the 1980 Presidential Election, or whether the Carter-Mondale Committee was actually afforded early and frequent access to ABC and the other national networks, but whether ABC, CBS and NBC were unreasonable in declining to sell a half-hour of time to the Carter-Mondale Committee during the first week of December, 1979. In essence, since the access requested was, in fact, granted several weeks later (pursuant to an ABC decision concerning the commencement of political time sales announced *prior* to the Commission's decisions), the basic question can be narrowed down to the rationale and policy for finding ABC unreasonable by four weeks in a national campaign that was nearly a year from completion.

The decision below mandates "access" without regard to the critical statutory caveat of "reasonableness." Like the Commission, the Court of Appeals viewed a week in December in isolation, declaring that a refusal to sell in that week represented a "flat ban" that was unreasonable. Although both the court and the agency have sought to cast this decision within the bounds of "objective" standards, such standards, in practice, defy objective implementation.

Such standards, in fact, thrust the Commission into a "continuing, case-by-case determination of who should be heard and when." *CBS* v. *DNC*, 412 U.S. at 127. A new

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[21] The Committee also requested and received a five-minute program on CBS on December 4, 1980.

system is created that not only transcends any requirements of the statute, but places the Commission at center stage in a highly charged political process. By fashioning standards that require the Commission repeatedly to assess the weight that should be afforded to the needs of individual candidates, and the adequacy of broadcaster responses to those needs, the decisions below create a regulatory scheme that goes beyond the legislative purpose of Section 312(a)(7) and conflicts with other important policies of the Communications Act and the First Amendment.

I. THE INTERPRETATION OF SECTION 312(a)(7) BY THE COURT OF APPEALS IS CONTRARY TO THE LEGISLATIVE PURPOSE OF THAT PROVISION AND CONFLICTS WITH OTHER FUNDAMENTAL POLICIES OF THE COMMUNICATIONS ACT

The decision below significantly alters the relationships of candidates, broadcasters and the Federal Communications Commission in the allocation of broadcast time for political purposes. Even though Section 312(a)(7) speaks in qualified and general terms (i.e., "*reasonable* access"), the court below has interpreted the statutory language in a manner that permits the Commission to effectively mandate broadcast sales based on its own exclusive determination of when a political campaign has begun. As we demonstrate below, this conflicts with the legislative history of Section 312(a)(7) and important policies of the Communications Act.

A. The Interpretation Contravenes Both The Plain Meaning Of The Statutory Language And Its Relevant Legislative History

Set apart from the main political broadcasting provisions of the Communications Act,[22] Section 312(a)(7)

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[22] Sections 315(a) and (b) of the Act, 47 U.S.C. §§ 315(a) and (b).

is contained in the Act's administrative remedies section and permits the Commission to "revoke any station license or construction permit . . . for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." 47 U.S.C. § 312(a)(7).

By its literal and conspicuous terms, ABC believes Section 312(a)(7) confirms a *general* right of broadcast access for legally qualified candidates for federal elective office. It manifestly fails to provide the terms and conditions of such access, incorporating, instead, only a concept of reasonableness—i.e., providing a remedy only where a station "willfully or repeatedly"[23] fails to allow "reasonable amounts" of broadcast time.[24] As this Court observed in *CBS* v. *DNC*, the amendment adopting Section 312(a)(7) was intended to "essentially codif[y] the Commission's prior interpretation of Section 315(a)

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[23] The conventional "willful or repeated" language not only emphasizes the penalty aspect of the provision, but provides a further indication that Congress intended to place a broadcaster's license in jeopardy *only* if the denial of access was complete—i.e., "repeated" and consistent throughout a given campaign—not to provide an actionable remedy based on differences of a week or month, as here, in a campaign that extends over many months.

[24] Subsequent to the decision under review, the Court of Appeals for the District of Columbia Circuit ruled that Section 312(a)(7) does not require a broadcaster to make available free time to a candidate when the broadcaster offers to sell time. *Kennedy for President Committee* v. *FCC*, Case No. 80-1549 (D.C. Cir. May 31, 1980, opinion filed, August 6, 1980). This reading of the statute is not only consistent with its plain meaning, but provides further support, we submit, for the discretionary element or standard of reasonableness intended by the provision.

as requiring broadcasters to make time available to political candidates." [25]

Nonetheless, the Court of Appeals placed considerable stress on that portion of the language in Section 312(a)(7) referring to a federal candidate's use of a broadcasting station "on behalf of *his* candidacy," and thereupon contrasting this with, what it said, was previous Commission policy that did not give attention to *individual* candidates. 629 F.2d at 11-12, Pet. App. 15a-16a. While Section 312(a)(7) does, indeed, single out federal candidates, the language highlighted by the Court of Appeals does not support the conclusion that this created an individualized access right in the fashion dictated by the holding below.

In this regard, it is noteworthy that even though the language of Section 315 refers to the use of a broadcast station by *any* candidate,[26] the rights and obligations thereunder are typically asserted and administered by the Commission as to *individual*, legally qualified can-

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[25] 412 U.S. at 113-14 n. 12, citing *Farmers Educational and Cooperative Union* v. *WDAY, Inc.*, 360 U.S. 525, 534 (1959) and FCC Memorandum on Second Sentence of Section 315(a), in *Political Broadcasts—Equal Time, Hearings before Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 88th Cong., 1st Sess., on H.J. Res. 247, pp. 84-90. In *Farmers Union*, this Court emphasized that a broadcaster policy that "den[ied] all candidates use of stations would . . . effectively withdraw political discussion from the air," in clear contravention of Congressional intent. 360 U.S. at 534. Moreover, the FCC Memorandum cited by the Court interpreted Section 315(a) and the public interest standard as requiring a broadcaster to provide time generally to political candidates.

[26] The Court of Appeals also suggests that the very fact that 315(a) encompasses all candidates, and 312(a)(7) singles out federal candidates, is itself further evidence of a new individualized access right for federal candidates. In our view, this distinction in the two statutory provisions merely shows that a *general* right was codified for *federal* candidates—*not* any other candidates.

didates.[27] Thus, it can be argued that all political broadcasting provisions are effectively applicable to *individuals* who demonstrate that they are legally qualified candidates and assert rights on behalf of *their* candidacies. This does not, however, begin to resolve the questions involved in this case—i.e., when and under what conditions political time sales must commence.

On its face, therefore, Section 312(a)(7) does not change the conditions of access. It merely codifies a *general* right of access as to federal candidates. That is why, we believe, this Court previously saw fit to characterize Section 312(a)(7) as essentially codifying a pre-existing general station *obligation* to provide access—the reciprocative of a general right of federal candidates to *obtain* access.

1. *The Interpretation Frustrates The Principal Legislative Goals Underlying The Federal Election Campaign Act of 1971*

The new gloss the decision below puts on Section 312(a)(7) takes that provision well beyond any expressed statutory intent. Contrary to the purposes of the general legislative framework in which it was enacted, Section 312(a)(7) has now been interpreted so as to *extend* an election media campaign to more than seven months before the first nominating convention and eleven months before the general election.

For instance, even though the legislative history of Section 312(a)(7) is limited, it is clear that a major purpose of the 1971 Federal Election Campaign Act was to shorten rather than extend the period for election campaigns. Thus, in adopting the "lowest unit charge"

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[27] It should also be observed that Section 315(b), which defines certain broadcast media rate limitations, speaks in terms of such rate provisions being applicable to *any* legally qualified candidate's campaign for *any* public office "in connection with *his* campaign for nomination for election, or election, to such office. . . ." 47 U.S.C. § 315(b) (emphasis added).

provision, Congress also established certain restrictive time periods during which the new rates would apply—45 days prior to a primary election and 60 days prior to a general election.[28] By so limiting the applicability of the lowest unit charge provision, Congress intended to provide an incentive to candidates to shorten their media campaigns and thereby reduce campaign costs. See S. REP. No. 92-96, 92d Cong., 1st Sess. 28 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 1773, 1781. On this point, Senators Prouty, Cooper and Scott observed that "[e]veryone agrees that political campaigns tend to be too long. We are hopeful that the 45- and 60-day provisions will encourage shorter campaigns." S. REP. No. 92-229, 92d Cong., 1st Sess. 118 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 1821, 1855.

The decision below effectively eviscerates the Congressional goal to shorten election campaigns by focusing on the earliest expression of individual candidate needs, and by giving the Commission the exclusive *ad hoc* power to judge whether particular federal election campaigns have begun. Indeed, the standards sanctioned in this case practically invite an even earlier start for the next national election—to say nothing of other federal elections. Such results flatly contravene the specific purposes of the 1971 Federal Election Campaign Act[29] and the generally acknowledged public interest in reducing both the length and the cost of political campaigns.[30]

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[28] FECA of 1971, § 103(a)(1), 47 U.S.C. § 315(b).

[29] See S. REP. No. 92-96, *supra*, at 20-22, 30-32, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS at 1774-76, 1783-86, making clear that Congress intended not only to shorten the length of campaigns, but to reduce the media and other costs of such campaigns.

[30] *See, e.g., Voters Demanding Shorter Campaigns, Less Mud,* Washington Post, Nov. 23, 1980, at A33, col. 1 (reporting the results of a recent Gallup poll); *Sloan Group Planning Presidential Campaign Study,* N.Y. Times, Dec. 7, 1980, at 69, col. 1.

In a similar vein, Congress was also especially mindful of the problem of incumbents taking unfair advantage of greater media exposure. Thus, as explained by Senators Scott and Mathias (co-sponsors of S. 956, one of the Senate bills under consideration at the time of Section 312(a)(7)'s adoption):

> "Our bill . . . requires that broadcasters may not refuse to sell 'reasonable' amounts of political broadcast time to all legally qualified candidates for public office. While we recognize the pitfalls in employing the word 'reasonable', we wish to make clear our intent. We want to assure that those few broadcasters who happen to favor incumbent candidates cannot continue to do so by forbidding the sale of time to the opposition as well." [31]

Contrary to this additional legislative concern, the court below has rendered a decision that permits, even encourages, wealthy candidates to launch their media campaigns as early as possible in order to strike a knockout punch against less well-financed opponents.[32]

2. *The Interpretation Undermines Congress' Intent To Preserve, Not Supplant, Licensee Discretion In The Political Broadcasting Area*

The proposal that ultimately became Section 312(a)(7) first appeared in a different form in one of three companion bills introduced and considered simultaneously. See S.956, 92d Cong., 1st Sess., § 302(d) (1971); *Hearings*

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[31] *Federal Election Campaign Act of 1971: Hearings on S.1, S.382 and S.956 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 348 (1971) [hereinafter *Hearings on S.1, S.382, and 956*].

[32] In recently announcing the commencement of a comprehensive study of Presidential campaigns, representatives of the Alfred P. Sloan Foundation indicated that one of the principal criticisms of current campaign practices is the increasing tendency to eliminate able candidates at early stages. See *Sloan Group Planning Presidential Campaign Study, supra.*

on S.1, S.382 and S.956, supra, at 133. Two concepts were interspersed in those three bills that, although never adopted, serve to explain the limited action the Congress intended by Section 312(a)(7).

The first of these was the proposed repeal of the "equal opportunities" provision of Section 315(a). During the hearings leading to the 1971 legislation, much concern was expressed that the "equal opportunities" provision often resulted in limiting rather than enhancing political broadcast time. *See, e.g.,* S. REP. NO. 92-96, *supra,* at 26, 34, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS at 1779, 1787. Reflecting this concern, Title I of S.382 as passed by the Senate contained an exemption from the "equal opportunities" requirements of Section 315(a) for the offices of President and Vice President.[33] However, the House version of the same bill did not include such a provision, and the Conference Committee elected to follow the House approach. S. CONF. REP. NO. 92-580, 92d Cong., 1st Sess. 21 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 1866-67.

Given this background, it is likely that the original impetus for Section 312(a)(7) was simply to counterbalance the anticipated repeal of the "equal opportunities" provision. It is natural to assume that some concern might have existed that a repeal of the "equal time" provision would represent a signal to broadcasters that they could reduce or eliminate the amount of time devoted to certain kinds of political programming (as contrasted with their overall political campaign coverage).[34]

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[33] It was during consideration of Title I of S.382 that the same Senate Commerce Committee added language now codified in Section 312(a)(7). See p. 28 *infra.*

[34] For example, it is especially likely that there may have been particular concern that stations would simply provide certain amounts of free time and not permit candidates to purchase addi-

Since such a concern is both likely and understandable, the origin of Section 312(a)(7) as essentially a measure to guard against such a result is at least one of the predominant themes interwoven in the overall legislative fabric.[35]

Thus, we find committee language that stresses the fundamental public interest obligation of broadcasters—previously defined by the Commission—to make their facilities available for political programming. Illustrative is the following excerpt from Senate Report No. 92-96:

> "The presentation of legally qualified candidates for public office is an essential part of any broadcast licensee's obligation to serve the public interest, and the FCC should continue to consider the extent to which each licensee has satisfied his obligation in this

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tional amounts of time. In this sense, it is worth recalling that the language of Section 312(a)(7) emphasizes the requirement to "*permit purchase* of reasonable amounts of time" (emphasis added).

[35] It is also important to recall and emphasize at this point that the same legislative package that produced Section 312(a)(7) contained a provision that specifically limited the amount of money candidates running for *federal elective office* could spend for the use of certain enumerated communications media (broadcast stations, newspapers, magazines, outdoor advertising and telephones), and the percentage of such expenditures they could devote to the *broadcast* media. FECA of 1971, §§ 102(1), 104(a)(1). See pp. 3-4 *supra*. Having so limited the communications and broadcast media expenditures of federal candidates, it is not surprising that Congress perceived a need to ensure that federal candidates received "reasonable access" to the broadcast medium. Thus, new restrictions on spending would certainly explain a concern on the part of federal legislators that federal candidates not be denied any *existing* rights and privileges in their use of the broadcast medium. Furthermore, it is highly unlikely that Congress would have so carefully set out to limit campaign costs and simultaneously fashioned in Committee a provision (Section 312(a)(7)) with the potential for increasing significantly the length (and attendant expense) of campaigns.

> regard in connection with the renewal of his broadcast license. Certainly no diminution in the extent of such programming should result from the enactment of this legislation.
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> "In order to emphasize the public interest obligation inherent in making broadcast time available to candidates covered by the spending limitation in the legislation, S.382 contains an express provision to this effect." [36]

It was in this broader context, therefore, that the Senate Committee on Commerce explained the specific addition of Section 312(a)(7):

> "Section 101(c) [the current "reasonable access" provision] was added in Committee. It amends Section 312(a) of the Communications Act to provide that willful or repeated failure by a broadcast licensee to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of his station's facilities by a lagally [*sic*] qualified candidate for Federal elective office on behalf of his candidacy shall be grounds for adverse action by the FCC.
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> "The duty of broadcast licensees generally to permit the use of their facilities by legally qualified candidates for these public offices is inherent in the requirement that licensees serve the needs and interests

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[36] S. REP. NO. 92-96, *supra* at 28, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS at 1781-82. This passage, read in context, also provides evidence that Congress adopted Section 312(a)(7) because of concern that the lower rates mandated by the amendments to 315(b) could effectively discourage media access. As Judge Bazelon found: "The report of the Senate Commerce Committee, which provides the most detailed discussion of the 1971 Act, characterizes Section 312(a)(7) as a statutory attempt to 'emphasize' the existence of an obligation to make time available to candidates in order to discourage licensees from reducing access in response to restrictions set elsewhere in the 1971 Act on the rates they could charge candidates during preelection periods." 629 F.2d at 12 n.32, Pet. App. 17a n.32 (citation omitted).

> of the committees [*sic*] of license. The Federal Communications Commission has recognized this obligation in its *Report and Statement of Policy Re: Commission En Banc Programming Inquiry* (1960)." [37]

A further indication that Congress did not intend to create rigid candidate access rights is found in the proposals that were considered (but ultimately rejected) to mandate specific broadcast time periods for political campaigning. Thus, Section 312(a)(7) was adopted only after Congress had also considered but rejected proposals that would have set aside specific broadcast time (or "access") periods for political campaigning. At the time, there were some groups and certain members of Congress who believed that the dual problem of escalating campaign costs spread over an increasingly lengthy period of time could or should be rectified by creating discrete political broadcast time periods.

For instance, S.1, one of the principal bills considered by the Senate prior to enactment of 312(a)(7), would have required, *inter alia*, each broadcast station and each network to make free prime time available to Presidential and Vice Presidential candidates. The bill specified the amounts of time, limited the program periods to half-hour segments, and specified the days prior to an election that the program time could be used. Moreover, reflecting the concern about the length of media campaigns, the bill would have required broadcasters to begin providing time approximately eight weeks before the Presidential general election.[38]

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[37] S. REP. NO. 92-96, *supra* at 34, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS at 1787.

[38] S.1, 92d Cong., 1st Sess. § 202 (1971). In addition, as this Court has acknowledged, Congress also considered and rejected other proposals that would have altered the policy against individualized access. Thus, it earlier rejected a bill introduced by Senator Fulbright that would have amended Section 315 to provide "a

Accordingly, viewed in the overall context in which Section 312(a)(7) originally arose, it is clear that Congress was responding to a number of concerns in a number of different ways. Although more direct solutions were considered—e.g., total or partial repeal of Section 315, and mandatory political access broadcast time periods—ultimately a more cautious, traditional approach was taken. There is certainly nothing to suggest that Congress intended to eviscerate the discretion traditionally exercised by broadcasters in response to requests for broadcast time by federal candidates. In fact, such a drastic result would have required a fundamental change in other important policies embedded in the Communications Act.

B. The Interpretation Is Inconsistent With Other Provisions And Policies Of The Communications Act

As shown, Section 312(a)(7) was enacted as part of a broad legislative reassessment of political campaigning, including the use of the broadcast media. The addition of Section 312(a)(7) to the penalty section of the Communications Act did not, however, disturb or change in any respect other provisions or policies of the Act that are premised on a concept of public trusteeship rather than a system of individualized non-discretionary access. As this Court has emphasized on several occasions, one of the most important features of the Communications Act is its rejection of a common carrier approach for

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reasonable amount of public service time" to authorized representatives of the Senate and the House of Representatives to present the views of the Senate and the House on public issues. S.J. Res. 209, 91st Cong., 2d Sess. (1970). See *CBS* v. *DNC*, 412 U.S. at 114 n.13. *See also* S.2876, 91st Cong., 1st Sess. (1969) (proposing to require television stations to provide local House and Senate candidates with specified amounts of spot announcement time as well as thirty minutes of prime time at reduced rates).

broadcasting,[39] favoring instead a system permitting broad journalistic freedom and discretion for broadcast licensees, subject to ultimate public accountability.

Thus, in *CBS* v. *DNC*, after undertaking a detailed review of the unique regulatory system created by the Communications Act, the Court concluded that "Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations." 412 U.S. at 110. In further characterizing the legislative history, Mr. Chief Justice Burger found "nearly a half century of unmistakable congressional purpose to maintain—no matter how difficult the task—essentially private broadcast journalism held only broadly accountable to public interest standards." *Id.* at 120.

Similarly, in *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 708 (1979), a case that struck down the Commission's mandatory access rule for cable television, the Court emphasized that it was "unable to ignore Congress' stern disapproval—evidenced in § 3(h)—of negation of the editorial discretion otherwise enjoyed by broadcasters and cable operators alike."

Finally, any survey of important statutory policies would be incomplete without stressing that Section 326 of the Communications Act, 47 U.S.C. § 326—which expressly prohibits Commission censorship of broadcast material—also "evince[s] a legislative desire to preserve values of private journalism under a regulatory scheme which would insure fulfillment of certain public obligations." *CBS* v. *DNC*, 412 U.S. at 109. On the

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[39] For instance, in *CBS* v. *DNC* the Court observed that, "after prolonged consideration," Congress "adopted § 3(h), which specifically provides that 'a person engaged in radio broadcasting shall not . . . be deemed a common carrier.' " 412 U.S. at 108 (footnote omitted). See Section 3(h) of the Act, 47 U.S.C. § 153(h). *See also FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 474 (1940) (footnote omitted) where this Court earlier stated that "broadcasters are not common carriers and are not to be dealt with as such."

whole, therefore, the legislative history of the Communications Act suggests that the decision of Congress to repudiate the concept of government ownership or control of broadcasting was "influenced not only by traditional attitudes toward private enterprise, but by a desire to maintain for licensees, so far as consistent with necessary regulation, a traditional journalistic role." 412 U.S. at 116 (Burger, C.J.). As Mr. Chief Justice Burger further summarized:

> "The historic aversion to censorship led Congress to enact § 326 of the Act, which explicitly prohibits the Commission from interfering with the exercise of free speech over the broadcast frequencies. Congress pointedly refrained from divesting broadcasters of their control over the selection of voices; § 3(h) of the Act stands as a firm congressional statement that broadcast licensees are not to be treated as common carriers, obliged to accept whatever is tendered by members of the public. *Both these provisions clearly manifest the intention of Congress to maintain a substantial measure of journalistic independence for the broadcast licensee.*" *Id.* (emphasis added) (footnote omitted).

Significantly, neither the Commission nor the Court of Appeals found any meaningful support in either legislative history or past decisions that would warrant a departure from these statutory principles. On the contrary, Section 312(a)(7) was integrated into a statutory scheme and developed against a deeply ingrained regulatory policy that mutually afford substantial discretion to broadcast licensees in the area of political broadcasting.[40]

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[40] It is particularly significant in this regard that even under the "equal opportunities" provision of Section 315(a) of the Communications Act—which grants opposing legally qualified candidates a right to equivalent response time—the Commission has recognized licensee discretion in a variety of important circumstances. *See, e.g., Humphrey for President Campaign*, 34 F.C.C.2d 471 (1972); *Rockefeller for Governor Campaign*, 59 F.C.C.2d 649 (B'cast Bur. 1976).

1. *Prior To Its Decision In This Case, The Commission's Interpretation Of Section 312(a)(7) Reflected The Foregoing Statutory Policies*

In recognition of the foregoing statutory policies, the Commission's first significant policy pronouncement following passage of Section 312(a)(7) stressed its intention to resolve political access claims under that new provision by its traditional "test of reasonableness." *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 F.C.C.2d 510, 536 (1972). One year later, in its first *ad hoc* interpretation of Section 312(a)(7), the Commission elaborated upon the standard it intended to follow:

> "[W]here a licensee's judgments or policies under the circumstances represent a reasonable, good-faith attempt to accommodate both the right of Federal candidates to fully inform the voters of their candidacies and the interest of the public in programming other than political broadcasts, this Commission will be disposed to affirm such judgments and policies as reasonably fulfilling the obligations of a licensee under Section 312(a)(7)." [41]

In subsequent decisions, although cautioning licensees against certain extreme policies—e.g., denying federal candidates program time in prime audience periods without regard to circumstances [42]—the Commission specifically refused to recognize a candidate's right to a particular length of program time or to particular placement on a licensee's broadcast schedule.[43] In fact, in a ruling

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[41] *Summa Corp.*, 43 F.C.C.2d 602, 604 (1973).

[42] 1978 *Report and Order*, 68 F.C.C.2d at 1090.

[43] *See, e.g., Hon. Pete Flaherty*, 48 F.C.C.2d 838 (1974). There, licensee denials of a senatorial candidate's request to program a four-and-a-half hour telethon on specified dates in support of his candidacy were held not unreasonable despite the candidate's claims that he needed "to explain [his] position on the issues" and

directly contrary to the Commission's ruling in this case, and one that the Court of Appeals dismisses as mere *dictum*, 629 F.2d at 16 n.59, Pet. App. at 26a n.59, the Commission's Broadcast Bureau concluded that "[a] licensee's discretion in providing coverage of elections extends not only to the type and amount of time to be made available to candidates, but to the date on which its campaign coverage will commence." *Anthony R. Martin-Trigona*, 66 F.C.C.2d 968, 969, *application for review denied*, 67 F.C.C.2d 33 (1977), *reconsideration denied*, 67 F.C.C.2d 743 (1978).[44]

The Commission's most extensive treatment of its policies and practices in interpreting Section 312(a)(7) came in a 1978 public inquiry. Up to that point, the Commission's interpretation of the provision had been almost entirely *ad hoc*.[45] The 1978 proceeding was de-

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"to ask financial and other support of the people in the election." *Id.* at 838. *See also Paul A. Talmey*, 49 F.C.C.2d 678 (B'cast Bur. 1974); *Hon. Donald W. Riegle*, 59 F.C.C.2d 1314 (1976) (offer of half-hour in prime or "early fringe" time instead of requested five minutes held not unreasonable even though candidate had made known his belief that a series of five minute programs was the "best way" to "introduce" himself to the voting public).

[44] In denying the reconsideration request of the senatorial candidate in that case, the Commission itself observed that "a candidate is not entitled to purchase any amount of broadcast time which he desires, at whatever time he wishes." 67 F.C.C.2d at 746.

[45] The one exception was a public notice containing a set of guidelines issued in question and answer form shortly after the Federal Election Campaign Act of 1971 was signed into law. Although Section 312(a)(7) was covered, the bulk of that public notice dealt with such matters as (1) the definition of a "legally qualified candidate;" (2) rates to be charged for use of a station by candidates; and (3) the certifications stations were then required to obtain from federal candidates (concerning the new spending limits)—all matters that either had been changed by or added to the law by the 1971 Act. See *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 F.C.C.2d 510, 536 (1972).

signed to examine various dimensions of the Commission's administration of Section 312(a)(7)—including the possibility of instituting more exacting standards. At the conclusion of the proceeding, however, the Commission decided against adopting either new rules or explicit policy guidelines. Instead, it favored maintaining its longstanding practice of entrusting ongoing political programming decisions to licensee discretion. In this sense, it confirmed important overall statutory policies as well as its own historical practices in implementing those policies:

> "Since the passage of Section 312(a)(7) as part of the Federal Election Campaign Act of 1971, the Commission's policy has generally been to defer to the reasonable, good faith judgment of licensees as to what constitutes 'reasonable access' under all the circumstances present in a particular case." [46]

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[46] 1978 *Report and Order*, 68 F.C.C.2d at 1079. Although the Commission has attempted to relate its actions in this case to its 1978 *Report and Order* (*see, e.g.*, 74 F.C.C.2d at 642, Pet. App. 87a), an examination of that document fails to support this assertion. Rather, even though the 1978 *Report and Order* contained an entire section devoted to "the question of whether there should be a particular point during a campaign at which a licensee's obligation to afford reasonable access begins" (68 F.C.C.2d at 1091), that section makes no reference to the fact that the access obligation is triggered by the start of the campaign or that the agency will make that determination. Moreover, the Commission has now attributed a role to the campaign needs and desires of individual candidates which the 1978 *Report and Order* did not accord. To the extent the subjective needs of individual candidates were discussed at all in the 1978 *Report and Order*, they were mentioned in an extremely narrow and limited context. Thus, in discussing *the classes and lengths of program time* to be made available to federal candidates, the Commission stated that "licensees *may* consider such factors as the unavailability of particular classes of time; a multiplicity of candidates; *the specific desires of candidates*, etc." 1978 *Report and Order*, 68 F.C.C.2d at 1090 (emphasis added). It is also noteworthy that, despite the Commission's present claims regarding the critical importance of the "needs" criterion, it was

Indeed, the most significant result of the 1978 proceeding was to reaffirm Commission reliance on licensee discretion. If the Commission believed that Section 312 (a) (7) created or required new terms and conditions for political broadcasting, it certainly took no action to implement such additional obligations.

For instance, the Commission's treatment of when political time sales must begin did not suggest that the relevant date was when the FCC found the campaign to have come into "full swing"—no matter how long before the election that might be (and it did not suggest any relevance for candidate "needs"). Rather, the Commission merely found that it would generally be unreasonable not to afford access to federal candidates during the statutory time periods adopted in the Federal Election Campaign Act of 1971—i.e., 60 days prior to a general election and 45 days prior to a primary election. 1978 *Report and Order*, 68 F.C.C.2d at 1091. As to when Section 312(a) (7) should be effective prior to a convention or caucus, the Commission decided against suggesting "any time limits" and merely repeated the statutory language that licensees would be expected to "afford access at a *reasonable time* prior to a convention or caucus." *Id.* at 1092 (emphasis added).

In sum, heretofore the Commission's predominant policy under Section 312(a) (7) has mirrored its longstanding policies in the political broadcasting area generally,[47] as well as practices strongly adhered to by both

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not even mentioned in the sections devoted to 312(a) (7) in the Commission's comprehensive political broadcasting *Primer* released several weeks after adoption of the 1978 *Report and Order*. See *The Law of Political Broadcasting and Cablecasting*, 69 F.C.C.2d 2209, 2287-89 (1978).

[47] See *Use of Broadcast Facilities by Candidates for Public Office*, 24 F.C.C.2d 832 (1970); *Rockefeller for Governor Campaign, supra; Hon. Dan Walker*, 57 F.C.C.2d 799 (B'cast Bur. 1975).

the Commission and the Court of Appeals in the analogous fairness doctrine area[48]—namely, a standard of reasonableness that affords substantial deference to licensee discretion.

2. *The Decision Below Substantially Departs From These Basic Statutory Policies*

The decision below effectively ignores these basic statutory policies by shifting from the broadcaster to the Commission the central role in determining both when political time sales should commence in all federal election campaigns[49] and whether sufficient consideration has been accorded to individual candidate campaign needs. Commission evaluations would thus supplant good faith broadcaster determinations applied uniformly to all candidates.

In the Court of Appeals' view, the determination as to when Section 312(a)(7) obligations attach is "purely

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[48] See *Fairness Report*, 48 F.C.C.2d 1, 8 (1974); *Democratic National Committee* v. *FCC*, 460 F.2d 891 (D.C. Cir.), *cert. denied*, 409 U.S. 843 (1972); *Green* v. *FCC*, 447 F.2d 323 (D.C. Cir. 1971); *American Security Council Education Foundation* v. *FCC*, 607 F.2d 438 (D.C. Cir. 1979), *cert. denied*, 100 S. Ct. 662, —— U.S. —— (1980).

[49] The determination of when time sales must begin is simply left to some form of initial "objective" Commission analysis of campaign "indicia." 629 F.2d at 17, Pet. App. 29a. Until this official "start of the election campaign," it is observed that "no request for time need be granted." *Id.* at 28, Pet. App. 54a. The precise mechanism for resolving these matters in future cases is by no means certain. In this case, of course, the "standard" was adopted after a complaint had been filed and the broadcasters had responded. In the future, will an uncertain broadcaster, faced with the first request for time in a given federal election campaign, rush to the Commission for a declaratory ruling on whether the campaign is in "full swing?" Will the Commission issue such declarations based on "all relevant facts and circumstances," *id.*, Pet. App. 54a, in literally hundreds of federal congressional or senatorial elections?

a legal judgment," not involving editorial discretion.[50] In other words, the Commission has the authority to make a legal judgment as to when a political campaign has been launched and, based upon that judgment, to impose access obligations under Section 312(a)(7). We suggest that there is nothing in the law, in logic, or the practical realities of the political process to support this approach.

First, a determination of when a campaign has begun is nothing more than a legal fiction. In reality, candidates decide when a campaign begins; they make it happen by their own actions.[51] Thus, the suggestion that the Commission has some special competence to make this determination is little more than an arrogation of governmental power. Further, the additional suggestion that broadcasters would not be totally disinterested, 629

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[50] 629 F.2d at 17, Pet. App. 28a. This *legal* judgment, as previously described (note 12 *supra*), consists of an independent survey by the Commission of various campaign developments—such as candidate announcements, fund raising activities, campaign organizations, media coverage, etc. In contrast, under the Commission's own political broadcasting rules and pursuant to longstanding agency practice, licensees are entrusted with the responsibility to make an initial *editorial* (rather than "legal") judgment concerning the same kind of campaign indicia in evaluating the bona fide status of candidates who request broadcast time. Thus, Section 73.1940(a) of the Commission's Rules and Regulations requires that, in making a "substantial showing" of "bona fide candidacy," the requesting candidate demonstrate and the responding broadcaster consider such campaign indicia as "campaign speeches," the distribution of "campaign literature," the maintenance of a campaign committee and the establishment of a campaign headquarters. 47 C.F.R. § 73.1940(a)(5).

[51] Indeed, there is evidence that we have entered the era of the perpetual campaign—at least as far as the Presidency is concerned. See *Sloan Group Planning Presidential Campaign Study, supra*, reporting that planning for the 1984 contest is well under way and that "money-raisers, opinion shapers and others are already busily at work."

F.2d at 17, Pet. App. 29a, might more appropriately be applied to an agency whose members are appointed for discrete terms by the President, whose Chairman serves at the pleasure of the President, and whose activities are the subject of continuing oversight by the Congress.

Second, a determination as to when political campaigns actually begin—whether determined by broadcasters or the Commission and however measured—is hardly dispositive as to when the sale of broadcast time must begin. This case is about media access. Neither the Commission nor the Court of Appeals offers a satisfactory justification for equating the start of the political campaign—no matter how far in advance of the election—with a broadcaster's obligation to entertain requests for the sale of media time. The result is unsupported by statute. It is not logical. And it is wrong as a matter of policy—greatly extending media campaigns (and the associated costs) directly contrary to clearly expressed legislative goals.

The lower court also endorsed the Commission's newly formulated requirement that broadcasters give weight to individual candidate needs in responding to requests for access. Under this scheme, broadcasters are effectively precluded from attempting to treat a campaign as a whole by assessing and responding to the needs of all candidates uniformly. Weighing individual candidate needs is, in fact, the very antithesis of treating candidates in the same election uniformly or as a group. It is also directly contrary to the political broadcasting tradition embodied in Section 315(a) requiring that *all* candidates be treated on an equivalent or uniform basis once broadcast facilities have been used for political appearances (i.e., the "equal opportunities" concept).

Moreover, the new focus on individual candidate needs has the practical effect of relegating to virtual obscurity such factors as the number of potential candidates com-

peting for airtime and the resulting degree of program disruption. The Commission has said that program disruption only becomes a significant factor toward the end of what candidates can choose to make a very long campaign.

Assurances by the Commission and lower court that this "needs" standard can be implemented without a "subjective" assessment of the political purposes of individual candidates [52] merely dodge or compound the problem.

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[52] *See, e.g.*, 74 F.C.C.2d at 667, Pet. App. 127a; 629 F.2d at 20, Pet. App. 35a. Indeed, the Commission's attempted assurances on this score tend to create rather than alleviate concerns in this area. Thus, as the Commission explained in its reconsideration decision, a broadcaster is not expected to evaluate "the 'political' importance or urgency of individual candidate needs in terms of a particular candidate's situation in the campaign, e.g., where he stands in the polls or how he has fared in specific primaries." 74 F.C.C.2d at 667, Pet. App. 127a. At the same time, however, the Commission further explained that the broadcaster must consider the candidate's assertions of need, such as the need "to discuss a complex set of issues important to the electorate which he believes cannot be accomplished through spot announcements or short program requests," *id.* at 668, Pet. App. 128a, and the candidate's need to articulate his position and record in a manner which " 'could not be accomplished later.' " *Id.*, Pet. App. 129a. Rather than providing assurances that the "needs" standard can be maintained on any "objective" basis, the Commission's expanded explanation actually highlights the high degree of subjectivity inherent in such a standard. Moreover, one can only wonder how broadcasters and the Commission will respond to future candidate requests that emphasize the candidate's need to discuss specific issues such as national defense, or the candidate's need to respond to pending legislation that affects issues on which a candidate's campaign is principally built (a not unlikely expression of "need" by fringe or third party candidates typically stressing one particular issue), or the candidate's need to defend himself or herself against charges of a personal nature, or the candidate's need for more broadcast time at a particularly early stage in order to overcome lack of public identity. In short, once the Commission starts down this road, it becomes virtually impossible to construct rational distinctions or to maintain government neutrality. (See pp. 43-49 *infra*, for a discussion of the serious constitutional ramifications of this form of decisionmaking).

Virtually any explanation or factual justification by an individual candidate is bound to be subjective as to his candidacy. Either the broadcaster accepts the candidate's statement of his needs or the broadcaster must make his own subjective assessment of the candidate's needs. The first alternative makes candidate needs virtually controlling; the second places the broadcaster, and ultimately the Commission, in the inappropriate position of "second-guessing" campaign strategy.

By its very nature—whether characterized as "subjective" or "objective"—a regulatory standard that requires an assessment of how much broadcast time an individual candidate needs and why he needs it will defy consistent and rational application. Moreover, the inherently vague and subjective nature of such a standard merely heightens the potential for arbitrary results and administrative abuse when broadcaster judgments are reviewed—i.e., permitting decisions to shift with the political makeup of the Commission and the nature and standing of the candidate pressing a particular complaint.

Thus, the effect of these two aspects of the Commission's decision—i.e., requiring broadcast media access from the date when the Commission says the campaign has begun and requiring deference to an individual candidate's perceived "needs"—effectively anoints the Commission as the ultimate decisionmaker in all matters of political access. In this context, ABC's good faith decision to offer time for the 1980 Presidential campaign beginning in early January, 1980, but not four weeks earlier, is declared manifestly unreasonable—a process of second-guessing broadcaster judgment that defies rational explanation and conflicts with deeply embedded past precedent.[53]

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[53] In a rather remarkable "defense" of licensee discretion in these circumstances, the lower court remarked that "a counter-offer of 15 minutes as opposed to a half-hour" might have been acceptable

While the legislative history of Section 312(a)(7) is limited, it is nevertheless clear that in enacting the Federal Election Campaign Act of 1971 Congress sought to reduce campaign costs and to shorten media campaigns. In failing to address these purposes, the Court of Appeals' decision not only contributes to the frustration of such legislative goals, it highlights the distorted different course the Commission's actions actually sanction. In other words, not only have clear legislative goals been thwarted, Section 312(a)(7) has been interpreted in a manner that is conspicuously inconsistent with the overall legislative scheme generally and past practice and analogous rulings in the political broadcasting area specifically.

Finally, by interpreting Section 312(a)(7) in the manner indicated, the Court of Appeals greatly accentuates a host of constitutional problems, a subject matter we turn to in the next section.

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or reasonable. 629 F.2d at 20, Pet. App. 37a. Putting aside the separate difficulties and uncertainties a broadcaster would face in attempting to defend a position (under the standards of this case) that held that a candidate's expressed needs could be satisfied by a lesser amount than the candidate *continued* to request, the court's suggestion merely highlights the artificial and inherently subjective nature of the required decisional process under the Commission's new standards. It also shows the real absence of licensee discretion when the ultimate determination is left to agency or judicial resolution of what is or is not reasonable based on only slight factual differences. Would 15 minutes indeed have been reasonable here and 30 minutes not if the Committee had continued to press for 30 minutes before the Commission? Was the first week of January unreasonable, but the first week of December perfectly reasonable? Was ABC, therefore, only unreasonable by a matter of three or four weeks? Would the result have been different (as in the *Martin-Trigona* case, *supra*) if the candidate were someone other than an incumbent President or a major party candidate? The mind boggles at the fine lines the Commission and the courts will be required to draw in the future if the "standards" announced in this case are left undisturbed.

II. THE STANDARDS FOLLOWED BY THE COMMISSION AND APPROVED BY THE COURT OF APPEALS FOR ADMINISTERING SECTION 312(a)(7) VIOLATE FUNDAMENTAL FIRST AMENDMENT PRINCIPLES

The decision in this case touches highly sensitive areas involving both the partisan political process and the editorial/programming decisions of broadcast licensees. Under the standards approved by the court below, not only is the Commission to make "legal" determinations concerning the commencement date of federal campaigns, but it is also to sit in judgment on whether broadcast stations have been sufficiently responsive to each candidate's expression of need for the time sought.

Implementation of these newly announced Section 312 (a) (7) standards indisputably intrudes upon licensee discretion and broadcaster First Amendment rights (a requirement to schedule a program against a broadcaster's will is an intrusion—even if regarded as a permissible one). Unless the decision below is overturned, the lesson of this case is likely to be that a broadcaster must make time available to candidates for Federal office in units of time demanded by the candidate and within an extremely narrow range of dates specified by the candidate. Moreover, the obligation to broadcast will exist without regard to the nature and extent of coverage otherwise given to a particular campaign, and irrespective of broadcaster policies designed to allocate time among all candidates in a particular election on a uniform rather than individual basis. The gravamen is, pure and simple, an explicit requirement to initiate specific programming under the threat of severe Commission sanction. As such, the interpretation of Section 312(a) (7) by the Commission and the court below threatens to upset the "delicately balanced system of regulation" [54]

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[54] *CBS* v. *DNC*, 412 U.S. at 102.

specifically engineered by Congress and previously upheld by the courts to accommodate the First Amendment rights of broadcasters with other recognized needs of the statutory scheme. See pp. 30-32 *supra*.

In addition, the standards specifically sanctioned under the construction adopted by the lower court involve highly sensitive political considerations—a point emphasized by Judge Tamm:

> "The Commission, through its implementation of section 312(a)(7), has come perilously close to falling into the chasm of impermissible government action." 629 F.2d at 34, Pet. App. 68a.

While the other members of the panel stated that "[t]he majority shares the first amendment concerns expressed by Judge Tamm, and welcomes the admonition regarding agency conduct that is embodied in his concurring opinion," *id.* at 25 n.117, Pet. App. 47a n.117, the fact remains that a clearly political matter was decided by an agency split along party lines in favor of an incumbent President of the same party as the majority Commissioners. It is difficult to perceive a more dangerous example of, as Judge Tamm remarked, "nonneutral government decisionmaking," *id.* at 29, Pet. App. 56a, aggravating already significant First Amendment tensions.

Despite an attempt by the Court of Appeals to place this case within the mainstream of past political broadcasting rulings,[55] the newly diminished licensee role and the heightened Commission involvement required by the

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[55] For instance, at one point the lower court dismissed the constitutional contentions of the networks by, *inter alia*, suggesting that "[t]he interference with editorial discretion seems no more or less" here than under the longstanding Commission interpretation of the obligation of broadcasters to provide time to political candidates as a group under the general public interest standard. 629 F.2d at 23 n.102, Pet. App. 42a-43a n.102.

decision greatly exacerbate constitutional concerns. As we have shown, the considerable discretion afforded broadcasters under all preexisting standards (including those specifically applying Section 312(a)(7)) has been virtually eviscerated here.[56] Of equal significance, broadcaster discretion has been rather rudely preempted by a new and substantial involvement by the Commission in the partisan political process. This role is fundamentally at odds with the concept of a free press and the principle of licensee discretion embedded in the Communications Act.

The decision below seriously threatens the neutral role that broadcasters and the government should maintain in candidate decisions regarding how broadcast facilities are used for political purposes. It does so by delegating to the Commission the "editorial" judgment of when a certain kind of political program must commence; and by premising that decision on a standard—the needs and political objectives of individual candidates—that places broadcasters (to the extent any discretion is left) and the government (in exercising an oversight function) in the prohibitive role of deciding to inaugurate broadcast campaigning based on an examination of the activities and purposes of individual candidates.[57]

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[56] See pp. 33-41, *supra*. The Court of Appeals sought to minimize the intrusive element of its decision by contending that a determination as to when statutory rights attach is "purely a legal judgment." 629 F.2d at 17, Pet. App. 28a. According to the court, since only the "editorial process" is protected, broadcaster rights are not invaded by this type of Commission determination because it is not an editorial decision involving a choice of program material. *Id.* at 16, Pet. App. 28a. This analysis, however, conveniently ignores the fact that a Commission declaration on the state of the campaign likewise controls the start of the media campaign. And the start of the media campaign clearly affects the choice of program material—involving, as it must, the interruption of regular programming and the addition of political advertising matter.

[57] In response to these concerns, the Court of Appeals contended that the Commission would only become impermissibly involved in

Similarly, by focusing on the needs of *individual* candidates, as opposed to the needs of candidates *in general* in an overall campaign, the lower court decision distorts the process and places both the Commission and broadcast licensees in the dangerous position of effectively favoring one candidate over another.[58] The prospect of a politically-appointed government agency reviewing broadcaster judgments relating to candidate needs raises issues that go to the heart of the First Amendment.[59] As Judge Tamm emphasized in his concurring opinion, the inherent political sensitivity of requests for access under Section 312(a)(7) "raises the serious danger of non-neutral government action favoring one speaker or view-

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the election process if it "sought to *set a starting date* for the campaign, rather than merely *find* that it has *already begun*." 629 F.2d at 16, Pet. App. 27a (emphasis in original). It is clear, however, that the decision below found that Section 312(a)(7) obligations attach when the Commission rules that the campaign has begun. By making the Commission declaration on the status of the campaign the trigger date for media access, the decision effectively establishes a starting date for the media campaign—a not insignificant part of the overall campaign in contemporary electioneering.

[58] In this context, it bears mentioning that while the Commission here employed a "needs" criterion to sustain the complaint of a political candidate, in future cases it could use the same subjective and nebulous standard to deny a candidate's complaint.

[59] *See FCC* v. *Pacifica Foundation*, 438 U.S. 726, 745-46 (1978), where Mr. Justice Stevens emphasized that "it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." In *Buckley* v. *Valeo*, 424 U.S. 1, 57 (1976) (footnote omitted), this Court emphasized that the government may not "retain control over the quantity and range of debate on public issues in a political campaign." *See also Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972); *Mills* v. *Alabama*, 384 U.S. 214 (1966); *CSC* v. *Letter Carriers*, 413 U.S. 548, 565 (1973) ("[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent").

point over another." [60] The highly charged circumstances of this case, involving a complaint by an incumbent President seeking reelection, highlight this danger of favoritism.[61] As Judge Tamm further observed, "members of the Federal Communications Commission may well have more than a passing interest in the outcome of federal elections, particularly presidential contests." [62] Moreover, "there is some evidence that the Commission has, on occasion, been subjected to direct political pressure." [63]

The principle of neutral decisionmaking emphasized by Judge Tamm and articulated by decisions of this

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[60] 629 F.2d at 34, Pet. App. 67a.

[61] In failing to act upon Judge Tamm's concerns, the court below also ignored its own teachings in *Columbia Broadcasting System, Inc.* v. *FCC*, 454 F.2d 1018 (D.C. Cir. 1971). There, the same court observed that an FCC decision favoring an incumbent President and disregarding an earlier agency precedent "raise[d] serious questions concerning the requirement of governmental neutrality in the area of the First Amendment." *Id.* at 1034.

[62] 629 F.2d at 32, Pet. App. 63a (footnote omitted).

[63] *Id.* at 33 n.16, Pet. App. 64a n.16. While ABC advances no suggestion that such pressure was exerted in this case, a framework nevertheless exists that would seem to call for extreme caution and agency insulation, rather than loose standards that actually depend on agency value judgments of essentially subjective factors. As Judge Tamm further observed:

> "As the present case suggests, the campaign for the Presidency itself is likely to be the most important occasion for the application of section 312(a)(7). The President and his party obviously have a strong interest in the outcome of a presidential election, particularly if the President himself is a candidate for reelection, and, by the time the campaign begins, the incumbent President will have appointed several (if a first-term President) or perhaps all (if a second-term President) of the sitting Commissioners. Even if a Commissioner makes every effort to remain impeccably neutral, it is nonetheless possible, especially in presidential campaigns, that his partisan and political affiliations might subconsciously influence his decisionmaking." *Id.* at 32-33, Pet. App. 64a (footnote omitted).

Court[64] is seriously threatened by the new standards laid down in this case—standards that stress the individual needs of candidates and make the determination as to when federal election campaigns begin for purposes of broadcast time sales a "legal" judgment of the Commission. As Judge Tamm notes, unlike the regulatory approaches exemplified by the fairness doctrine and the personal attack/political editorial rules upheld by this Court in *Red Lion*,[65] the form of Commission review sanctioned under Section 312(a)(7) permits agency review and implementing orders even though the broadcaster has made no initial choice in the presentation of particular program material. In contrast, here:

> "The danger of government nonneutrality under section 312(a)(7) is exacerbated by the Commission's emphasis, in its standards governing the right of access, on the 'individual needs' of the candidate. Whether and to what extent a candidate is entitled to broadcast access depends on a weighing of his 'individual needs' against the other relevant considerations detailed by the Commission. This evaluation may lead to a determination, for example, that a candidate requesting a half hour for a particular purpose may instead be entitled to only fifteen minutes, *see* [629 F.2d at 20, Pet. App. 37a]; another candidate, on the other hand, may be found entitled to the full half hour that he seeks.
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> "Thus, without regard to any prior broadcast coverage of opposing candidates, an agency of the federal government is authorized to decide, based in significant part on the candidate's 'individual needs,' whether and to what extent a given political candi-

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[64] See cases cited in note 59 *supra*. See also *CBS* v. *DNC*, 412 U.S. at 117 (Burger, C.J.).

[65] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

date is entitled to be heard on the nation's airwaves." [66]

In sum, by effectively usurping any meaningful licensee discretion and failing to recognize the dangers of interjecting the Commission too deeply into the editorial process when political candidates seeking federal office request broadcast time, the decision in this case violates important constitutional principles. A scheme that so completely transfers decisions as to "whether and to what extent a given political candidate is entitled to be heard on the nation's airwaves" also conflicts with the underlying concerns expressed by this Court in *CBS* v. *DNC* that the Commission should avoid being drawn "into a continuing case-by-case determination of who should be heard and when." 412 U.S. at 127. As this case demonstrates anew, one of the most critical problems in accommodating the First Amendment to broadcast regulation is the constant "risk of an enlargement of Government control over the content of broadcast discussion of public issues." *Id.* at 126 (citation omitted).

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[66] 629 F.2d at 32, Pet. App. 62a-63a. Judge Tamm's own solution to avoiding these profound difficulties was to approach the analysis of the "individual needs" factor by "focus[ing] solely on the candidate's needs *as stated by the candidate*"—"both at the broadcaster level and before the Commission on review." *Id.* at 34, Pet. App. 67a-68a (emphasis in original). However, if broadcasters are not required to evaluate or weigh each candidate's needs, the standard would appear to be meaningless since any candidate requesting broadcast time obviously regards such a request as necessary to his "needs." At the same time, if broadcasters and the Commission in reviewing such requests are, in fact, required to perform a political weighing process, maintaining a neutral role in the political process becomes virtually impossible.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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December 18, 1980